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Supreme Court of the United States

OCTOBER TERM, 1996

TED LAPIDUS, S.A.,

Petitioner,

v.

AVROM R. VANN, ESQ. et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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69 pp

QUESTIONS PRESENTED

1. **Does a sanction imposed on an attorney during the pendency of a litigation for vexatiously multiplying the proceedings satisfy the tripartite test of the "collateral order doctrine" set forth by this Court to justify immediate appellate review?**

2. **Does an attorney who has been sanctioned in an interlocutory order have a right to appellate review after termination of the underlying case?**

PARTIES TO THE PROCEEDING

TED LAPIDUS, S.A.,

Petitioner,

v.

77 WORLD DESIGN, INC., DESIGNERS ONLY, INC., NAMES FOR DAMES, INC., STANLEY WARNER, ROCHELLE PAZER, JACK WELIKSON,

and

ARVOM R. VANN, ESQ.,

Respondents.

There are no publically owned parent companies or subsidiaries of any of the corporate parties.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Ted Lapidus, S.A, (Ted Lapidus) prays that this Court issue a writ of certiorari to review the Questions Presented and those fairly included therein. Petitioner notes that resolution of the questions presented herein is important and is currently the subject of a dispute among the circuits that can be resolved only by this Court.

OPINIONS BELOW

The report of the opinion below delivered by the Court of Appeals for the Second Circuit is located at A1, and is reported at 112 F.3d 91. The report of the opinion below delivered by the District Court for the Southern District of New York is located at A21, and is reported at 1996 U.S. Dist. Lexis 11189 and in the United States Patents Quarterly, at 40 USPQ.2d 1698.

JURISDICTION

The final opinion of the Court of Appeals was entered on April 25, 1997. Jurisdiction to review this petition by writ of certiorari is conferred upon the Court by 28 U.S.C. §1254(1). The district court had jurisdiction over the claims in the first instance under the provisions of 28 U.S.C. §1338 and 15 U.S.C. §1121.

STATUTES INVOLVED

28 U.S.C. §1291. Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

28 U.S.C. §1927. Counsel's liability for excessive costs

Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

STATEMENT OF THE CASE

Petitioner, Ted Lapidus, S.A., instituted the district court action for trademark counterfeiting in October, 1994 by obtaining an *ex parte* Order to Show Cause and Order of Seizure. The seizure was executed at the defendants' offices by counsel for petitioner, a private investigative agency, and the New York City Police

Department. Thousands of counterfeit garments were seized.

Seven months thereafter, counsel for the defendants below served a third-party complaint for false arrest and wrongful seizure naming, as third-party defendants, petitioner's counsel and petitioner's private investigative agency and the principal thereof.

In August, 1995, the district court, in a written opinion (A21) imposed sanctions under Title 28 §1927 on respondent, Avrom R. Vann, Esq., who is counsel for defendants below. The sanctions were based upon (1) Mr. Vann's service, without leave of court, of the third-party complaint; (2) Mr. Vann's subsequent amplification of the third-party proceedings, including his attempt to disqualify petitioner's counsel based upon his presence as a third-party defendant; and (3) Mr. Vann's persistent refusal to withdraw the third-party complaint despite being informed by the court that leave to serve the third-party complaint would not be granted.

Mr. Vann appealed the sanction award, which was vacated and remanded by the Court of Appeals for the Second Circuit for lack of due process. The Second Circuit held that the district court failed to give Mr. Vann adequate notice that sanctions may be imposed under §1927. During the appeal, Mr. Vann vigorously opposed petitioner's *pro forma* motion to file an appendix of evidence and affirmatively moved to strike petitioner's brief as being scandalous. The Second Circuit granted petitioner's *pro forma* motion and denied Mr. Vann's

motion. In its decision, the Second Circuit noted that the proceedings in the underlying dispute had been substantially delayed due to the appeal (A13).

ARGUMENT

Sanctions imposed against an attorney during the pendency of a pending litigation should not be subject to immediate appellate review since the interlocutory imposition of sanctions does not satisfy the tripartite test of the collateral order doctrine. Moreover, immediate appellate review unavoidably delays the underlying proceedings and prejudices the non-sanctioned adversary party by focusing the court and counsels' attention on the appeal. Since sanctions are often imposed on attorneys for causing an unwarranted and vexatious delay in the underlying proceedings, immediate appellate review tends to amplify the problem by creating additional delay and turning the focus of the litigation to the sanction award. In addition, the delay caused by immediate appellate review permits unscrupulous counsel and their clients to further multiply the proceedings -- which is precisely what sanctions were imposed for in the first instance.

When a sanctioned attorney is permitted an immediate appeal during the pendency of the action in which he was sanctioned, the conduct for which he or she was sanctioned is subject to review and the district court's judgment is open for review. Not only does the mere existence of the appeal detract the non-sanctioned

adversary's counsel's attention from the underlying action, but the non-sanctioned attorney's client is subject to further abusive conduct in the form of additional delay occasioned by an already sanctioned attorney. If the appellate court vacates or reverses the district court's sanction award, the once-sanctioned conduct may simply be repeated once again in the district court. Additional delay is inevitable. In view of the appellate courts' tendency to reverse sanction awards issued under Title 28 U.S.C. §1927, particularly in the Second Circuit, the immediate appellate review of such awards can have devastating consequences in the underlying action since a reversal of such an award gives a vexatious attorney license to repeat and amplify the conduct for which he or she was sanctioned, and to abuse his or her adversary once again.

From a more practical standpoint, the client of the non-sanctioned counsel, who is most often the plaintiff, should be given the opportunity to obtain a judgment before being burdened with the additional cost of responding to an appeal of attorney sanctions imposed on its adversary's counsel. Immediate appellate review punishes the innocent party.

For the above reasons, appellate review of attorney sanction awards should await final judgment. As demonstrated hereinafter, there is a dispute among the circuits concerning the immediate appealability of attorney sanctions, and this dispute can likely be resolved only by this Court. Currently, the Second, Seventh, Eighth and

Eleventh Circuits permit immediate appeals while the First, Third, Fifth, Tenth and Federal Circuits do not.

The compelling need to resolve this dispute is self-evident. Due to the potential stigma of sanctions, attorneys often seek immediate appellate review of sanctions, thereby burdening an already overloaded appellate caseload. Only by prohibiting the immediate appellate review of such interlocutory orders can this caseload be reduced. Immediate appeals of sanctions are also undertaken by sanctioned counsel at the expense of their clients' interests in the underlying action and, more importantly, at the expense of the innocent party's interest in proceeding to trial as quickly as possible. In practice, the burden and expense of an interlocutory appeal over attorney sanctions prejudices innocent parties.

An appeal of attorney sanction awards should not be permitted at the expense of the underlying proceedings. This can be prevented only by compelling sanctioned counsel to await a final judgment to intervene and appeal the award of sanctions. This Court should grant this petition and issue a writ of certiorari to that effect.

The discussion presented above reveals clearly, concisely and briefly the nature of this dispute. The following discussion is provides for additional background information and caselaw concerning the nature of the conflict among the circuits regarding the immediate appealability of attorney sanctions.

A. Attorney Sanction Awards are Interlocutory Orders, Which Are Generally Not Appealable Until Entry of Final Judgment

Federal appellate jurisdiction is conferred on the courts of appeal by 28 U.S.C. §1291, which grants the appellate courts jurisdiction over all final orders. Although the exact definition of "finality" is unclear, courts have accepted the general notion that a final judgment is "a decision by the district court that '... leaves nothing for the court to do but execute the judgment'". *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 467 (1978) (quoting *Catlin v. United States*, 324 U.S. 29, 233 (1945)); *see also Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 373-74 (1981) *See generally* 9 J. Moore, B. Ward & J. Lucas, *Moore's Federal Practice*, at ¶110.08[1] (2d ed. 1990).

Awards that do not make a final determination on the merits are deemed interlocutory, *Catlin*, *supra*, 324 U.S. at 233, and therefore not fit for immediate review. An order denying a motion to disqualify the opposing party's counsel is deemed interlocutory, *Firestone Tire & Rubber Co.*, *supra*, 449 U.S. 368, as is an order denying class certification. *Coopers & Lybrand*, *supra*, 437 U.S. 463. When motions for the appeal of interlocutory orders are presented, they are denied and the underlying litigation continues.

The final judgment rule embodied in 28 U.S.C. §1291 bars appellate review of district court orders until there is a final disposition of the underlying matter. *See*

generally 9 J. Moore, B. Ward & J. Lucas, *supra*, at ¶110.08[1]. Courts have used this rule to prevent piecemeal litigation and promote judicial economy. *See Risjord*, 449 U.S. at 374 (the rule "serves the important purpose of promoting efficient judicial administration."); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 170 (1974) ("Restricting appellate review to 'final decisions' prevents the debilitating effect on judicial administration caused by piecemeal appellate disposition of what is, in practical consequence, but a single controversy."); *In re Licht & Semonoff*, 796 F.2d 564, 569 (1st Cir. 1986) ("the purpose of the §1291 requirement limiting appellate review to final decisions is to avoid piecemeal litigation, promote judicial efficiency, reduce the cost of litigation, and eliminate the delays caused by interlocutory appeals"). *See generally*, 9 J. Moore, B. Ward & J. Lucas, *supra*, ¶110.07 (discussing the policy reasons for the final judgment rule).

The final judgment rule reflects the judgment of this Court that there should be as few delays in the litigation process as possible. *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424, 430 (1985); *See Risjord*, *supra*, 449 U.S. at 374. Appellate review of every lower court order handed down during the pretrial process and the trial itself would be unnecessary and inefficient. *Richardson-Merrell*, *supra*, 472 U.S. at 430. Equally as important, the final judgment rule reflects the concern that immediate appellate review of every order could be used by litigants to harass opposing parties and thereby prevent the speedy disposition of just claims. *Risjord*, 449 U.S. at 374;

Cobbledick v. United States, 309 U.S. 323, 325 (1940). Finally, the rule reflects the belief that appellate courts, out of deference and respect for the decisions of lower courts, should not intervene in the trial court decision-making process until the court has completed its task. *Risjord*, *supra*, 449 U.S. at 374 (noting that the final judgment rule "emphasizes the deference that appellate courts owe to the trial judge as the individual initially called upon to decide the many questions of law and fact that occur in the course of a trial. Permitting piecemeal appeals would undermine the independence of the district judge ..."); *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949) (concluding that the intent of the rule was to effectuate deference to lower court decisions because the power of review should not be the power of intervention).

The immediate appeal of an attorney sanction award offends the final judgment rule. Such an appeal will likely cause substantial delay. Moreover, in the event the conduct deemed sanctionable and undertaken in bad faith by the district court is deemed non-sanctionable by the appellate court, that same conduct is likely to be repeated with impunity in the district court, for example, by the re-filing of papers initially deemed vexatious. Interlocutory attorney sanctions are within the class of interlocutory orders that the final judgment rule was created to address.

B. A Sanction Order Against an Attorney is Not a Final Order Under Title 28 U.S.C. §1291

An attorney sanction award does not finally determine the underlying dispute and is therefore not a final order. While the Eighth and Ninth Circuits have erroneously held that an order imposing sanctions against an attorney for a party is a final order pursuant to 28 U.S.C. §1291 and is, therefore, immediately appealable, *see Crookham v. Crookham*, 914 F.2d 1027 (8th Cir. 1990) and *Reygo Pac. Corp. v. Johnston Pump Co.*, 680 F.2d 647, 648 (9th Cir. 1982), no other circuit has made the same error. Indeed, all other circuit courts have expressly held that an order imposing sanctions against a party is clearly not a final order appealable under 28 U.S.C. § 1291 or an interlocutory order appealable under 28 U.S.C. §1292(c). *See, e.g., M.A. Mortenson Co. v. United States*, 877 F.2d 50 (Fed. Cir. 1989) (*see also* all other attorney sanction cases cited hereinbelow).

C. The Collateral Order Doctrine Permits Appeals of Interlocutory Orders in Only Limited Circumstances

The practical construction of the final judgment rule led to the development of the collateral order exception to that rule. This Court established the criteria for the collateral order doctrine in the case of *Cohen v. Beneficial Industrial Loan Corp.*, *supra*, 337 U.S. 541. In *Cohen*, this Court held that an order denying a request to require the plaintiff to post a security bond in a derivative

suit may be appealed even though it is technically not final under section 1291. *Id.* at 546-47. According to this Court, Cohen fell into a small class of cases in which the order finally determines "claims of right separable from, and collateral to [the merits of the action], too important to be denied review and too independent" to await final adjudication of the case. *Id.* at 546. Thus, this Court carved out an exception to the final judgment rule that provided for the immediate review of collateral orders "when rights conferred by that statute ... will have been lost, probably irreparably," if the appeal is delayed. *Id.*

In *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978), this Court refined *Cohen* by enunciating a three-pronged test for analyzing interlocutory appeals under the newly created collateral order doctrine: (1) "the order must conclusively determine the disputed question; (2) "resolve an important issue completely separate from the merits of the action"; and (3) "be effectively unreviewable on appeal from a final judgment" *Id.* at 468. In order to qualify as a collateral order, an interlocutory order must meet all three prongs of the Cohen test.

Applying these criteria, this Court held in *Coopers & Lybrand* that an order denying a motion for class certification is not collateral because it fails all three prongs of the Cohen test. The order fails the first prong because it can be altered or amended by the court before final judgment. In this regard, Rule 23(c)(1) of the Federal Rules of Civil Procedure allows an order granting or denying class certification to be altered or amended

before the end of the trial. The order fails the second prong of the Cohen test because it is "enmeshed in the factual and legal issues" of the cause of action -- the plaintiff's status as a class is linked to their cause of action. *Id.* 437 U.S. at 469. The order fails the third prong because it can be appealed by the plaintiff or an intervening class member at the end of the trial. *Id.*

Courts have adhered strictly to the Cohen tripartite test in applying the collateral order doctrine, and have limited its use to situations where rights will be irreparably harmed if review is delayed until after final judgment. Examples of orders that have passed the Cohen test include denials of qualified immunity, *see, e.g., Mitchell v. Forsyth*, 472 U.S. 511 (1985), orders directing the defendant to pay the costs of notice in a class action, *see, e.g., Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974), orders denying a motion to reduce bail, *see Stack v. Boyle*, 342 U.S. 1 (1951), and orders denying a motion to proceed in forma pauperis, *see e.g., Roberts v. United States Dist. Court*, 339 U.S. 156 (1974). In contrast, courts have not permitted interlocutory appeal of decertification orders in class actions, *Coopers & Lybrand v. Livesay, supra*, 437 U.S. 463 (1978), or orders denying a motion to dismiss for forum non-conveniens, *see Van Cauwenberghe v. Biard*, 486 U.S. 517 (1988). As pointed out below, there is a split of authority as to whether attorney sanction awards meet the Cohen tripartite test.

While all three prongs of the Cohen test must be satisfied to permit an immediate appeal of an

interlocutory order, courts usually focus on the third prong of this test. The third prong questions the "urgency" of the appeal. It turns on whether irreparable harm would result to the appellant from a delay in obtaining appellate review of the challenged district Court sanction order.

This Court, in *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368 (1981), explained the meaning of the irreparable harm requirement of the Cohen test. *Firestone* involved the appeal of an order denying an appeal of the denial of a motion to disqualify counsel which attempted to show that the litigation could be "indelibly stamped" by the prejudicial effects of continued representation by the opposing counsel. "Much more" than the potential irreparable effects of delaying the appeal on the outcome of the litigation must be shown, according to the Supreme Court, to justify an immediate appeal from an interlocutory order. The denial of an immediate appeal must make any effective review "impossible", or effectively "destroy" the "legal and practical value" of the appellant's right to appeal the district court's order. Denial of immediate appeals of attorney sanction orders does not meet this standard.

In other words, this Court seems to allow immediate appellate review of an interlocutory order only when the consequences of delay would cause significant financial difficulties rendering continuing litigation unduly burdensome and when a delayed review after final judgment would be impossible or otherwise futile. On the

other hand, when an order simply makes litigation more onerous -- not impossible -- this Court has required a final disposition of the underlying matter. Attorney sanctions ordered during the pendency of a dispute do not meet this standard since counsel can intervene at the close of the case and appeal the imposition of sanctions. The courts that have allowed immediate appeals of sanctions have done so under the rationale that an attorney might not be able to appeal if the case is settled. However, these courts have overlooked the right of an attorney to intervene in the underlying case with respect to issues relating to attorneys' fees.

D. There is a Dispute Among the Circuits Regarding the Immediate Appealability of Attorney Sanction Awards

There are three situations in which the issue of the appealability of sanctions arise. First, a party to an action who is sanctioned under Rule 11 (or a similar sanctioning mechanism) may attempt to seek immediate appellate review of the order. Second, an attorney who is sanctioned and subsequently withdraws from the litigation may request an immediate appeal of the order. Third, an attorney who is sanctioned but remains active in the litigation may seek immediate review of the order.

Courts are in general agreement that sanctions imposed against a party to the litigation are not immediately appealable because they do not fall within the parameters of the collateral order doctrine. It is also

understood that sanctions imposed against an attorney who subsequently withdraws from the litigation are immediately appealable because they do fall within the collateral order doctrine. *See Knorr Brake Corp. v. Harbil, Inc.*, 738 F.2d 223 (7th Cir. 1984); *Tamari v. Bache & Co.*, 729 F.2d 469 (7th Cir. 1984); and *Eavenson, Achmuty & Greenwald v. Holtzman*, 775 F.2d 535 (3d Cir. 1985).

There is a clear dispute among the circuits, however, as to whether sanctions imposed against an attorney who remains in the litigation should be immediately appealable. Petitioner argues that they should not be immediately appealable.

In resolving the issue of whether an attorney sanctioned alone may immediately appeal a sanction order, the circuit courts generally look to the third requirement of the Cohen collateral order doctrine, i.e., whether the sanction order is effectively unreviewable on appeal after final judgment. The nature of the dispute among the circuits will be discussed below.

The Second, Seventh, Eighth, and Eleventh Circuits have concluded that when an attorney, but not the party, is sanctioned, the attorney is a non-party and may therefore be precluded from seeking later review of the sanction order if the underlying action is settled or is not appealed. Hence, these circuits hold that an attorney for a party may immediately appeal a sanction order pursuant to the collateral order doctrine of Cohen. *See, e.g., Cheng v. GAF Corp.*, 713 F.2d 886 (2d Cir. 1983);

Sanko S.S. Co. v. Galin, 835 F.2d 51 (2d Cir. 1987); *Frazier v. Cast*, 771 F.2d 259 (7th Cir. 1985); *Crookham v. Crookham*, 914 F.2d 1027 (8th Cir. 1990); *Transamerica Commercial Fin. Corp. v. Banton, Inc.*, 970 F.2d 810 (11th Cir. 1992); *DeSisto College, Inc. v. Line*, 888 F.2d 755 (11th Cir. 1989), *cert. denied*, 495 U.S. 952, 109 L.Ed.2d 544, 110 S. Ct. 2219 (1990).

In *Cheng*, *supra*, the Second Circuit permitted an immediate appeal by a sanctioned attorney because the attorney, "as a non-party, may never receive any appellate review of the fee award if he is denied that opportunity now." *Cheng*, 713 F.2d at 890. In *Frazier*, a sanction order against an attorney for a party was found to be immediately appealable. Applying the Cohen test, the Seventh Circuit reasoned that because the sanctions are imposed against a non-party, the order is not reviewable on appeal from a final judgment. The parties may settle, so that the district court could never enter a final judgment. Alternatively [the party] could elect not to appeal whatever final determination is made, thereby possibly precluding his attorney from appealing the sanction order. *Frazier*, 771 F.2d at 262. As noted above, these courts neglected to recognize that the sanctioned attorney may intervene and appeal the sanction award after entry of a final judgment.

Based on similar reasoning, the Eleventh Circuit in both *DeSisto* and *Transamerica* concluded that an order imposing sanctions against an attorney was immediately appealable pursuant to Cohen. "Without immediate

review, counsel's right to challenge the sanctions might be forever lost." *DeSisto*, 888 F.2d at 763. The *Transamerica* Court stated that an attorney as a non-party may not be able to seek review of a sanction imposed on him or her upon appeal from a final judgment against all parties. There may be no appeal from a final judgment, because the remaining defendants may settle or may decide not to appeal. *Transamerica*, 970 F.2d at 815.

In contrast, the First, Third, Fifth, Tenth and Federal Circuits have correctly determined that the appeal of a sanction order issued only against an attorney for a party must await final judgment. These Circuit Courts have concluded that such sanction orders do not satisfy the third prong of the Cohen collateral order analysis because the order is reviewable after final judgment is entered. *See, e.g., In re Licht & Semonoff*, 796 F.2d 564 (1st Cir. 1986); *Eastern Maico Distribs. v. Maico-Fahrzeugfabrik*, 658 F.2d 944 (3d Cir. 1981); *Click v. Abilene Nat'l Bank*, 822 F.2d 544 (5th Cir. 1987); *G.J.B. & Assocs. v. Singleton*, 913 F.2d 824 (10th Cir. 1990). The First and Third Circuits also have suggested that attorney sanction orders may not be entirely separable from the underlying case and therefore do not satisfy the second prong of the Cohen analysis either. *Licht*, 796 F.2d at 570; *Eastern Maico*, 658 F.2d at 947.

In *Licht*, the First Circuit concluded that an attorney actively representing a party is not akin to a non-party in the underlying suit because "an attorney is involved in all aspects of the case." *Licht*, 796 F.2d at

570. The court also determined that the sanction order was not collateral to the underlying case because the sanctions were imposed as a result of the firm's conduct of discovery and "cannot realistically be considered a separate matter from the ongoing case." *Id.*

The *Licht* Court further determined that no harm would befall the attorney by postponing the appeal of a sanction order until final judgment is entered. The Court perceived no reason why an attorney of record should not be allowed to appeal a sanction order even if the main case was terminated without a party appealing. *Licht*, 796 F.2d at 572. The Court reasoned that a sanction order is best appealed after final judgment is entered, as the appellate court could then review the sanction order against the background of the case as a whole. The Court added that this would be more efficient and cost effective. *Id.*

Similarly, in *G.J.B. & Assocs.*, the Tenth Circuit held that "a sanction order against counsel currently of record is not appealable under the Cohen collateral order exception to the final judgment rule." *G.J.B. & Assocs.*, 913 F.2d at 829. The Court rejected, as did the *Licht* court, "any notion that an attorney risks losing the right to appeal if the parties settle or elect not to appeal from the final judgment" and stated, "we see nothing to prohibit an attorney of record from appealing a sanction order when the main case concludes." *Id.; see also Click, supra*, 822 F.2d at 545 (order awarding Fed. R. Civ. P. 11 sanctions against attorney is neither final nor appealable

under the collateral order doctrine of Cohen because order would be appealable when merged into the final judgment).

In *Eastern Maico*, the Third Circuit held that an order imposing sanctions against an attorney for violation of discovery orders did not satisfy either the second or third prong of the Cohen test and therefore was not immediately appealable as a collateral order. *Eastern Maico, supra*, 658 F.2d at 947. The court determined that "the congruence of interests here is so great that [the attorney's] status as a non-party is arguable." *Eastern Maico*, 658 F.2d at 950; *cf. Eavenson, Auchmuty & Greenwald v. Holtzman*, 775 F.2d 535, 539-40 (3d Cir. 1985) (allowing immediate appeal of sanction order against attorney no longer of record).

Some circuit courts have ruled on the appealability of a sanction order issued jointly and severally against the attorney for a party and the party. The Second and Eleventh Circuits maintain that in this situation the attorney sanctioned and the party are allowed to immediately appeal the sanction order. *Thomas E. Hoar, Inc. v. Sara Lee Corp.*, 882 F.2d 682 (2d Cir. 1989); *Ortho Pharmaceutical Corp. v. Sona Distribs.*, 847 F.2d 1512 (11th Cir. 1988).

In *Thomas E. Hoar, Inc.*, the Second Circuit determined that an attorney, even when sanctioned along with the party he or she represents, is still a non-party to the action and may be precluded from seeking review of the sanction order after final judgment. "The right to

review of the district court's order that imposed the sanction on appellants can be guaranteed only by the option of one immediate interlocutory appeal." *Id.* 882 F.2d at 686. To promote judicial efficiency, the party was permitted to join the interlocutory appeal." *Id.* 882 F.2d at 687. In *Ortho*, the Court conclusively stated that when a Rule 11 sanction directs a non-party (jointly and severally with parties to the action or alone) to pay immediately-- that is, before entry of final judgment-- significant attorney fees and costs, the appellate court has jurisdiction to hear immediate appeal of the sanction order. *Ortho*, 847 F.2d at 1515.

The Seventh Circuit, while allowing immediate appeal of sanctions imposed against an attorney only, specifically declined to "decide whether sanctions imposed . . . against an attorney and a party, or a party alone, would be appealable under Cohen." *Frazier*, 771 F.2d at 262, n.1. Although the Ninth Circuit ruled that an order imposing sanctions only against an attorney for a party is immediately appealable as a final order, that court reached a different conclusion when sanctions were imposed against both an attorney for a party and the party. In *Kordich v. Marine Clerks Ass'n*, 715 F.2d 1392 (9th Cir. 1983), the Ninth Circuit expressly agreed with the reasoning of the Third Circuit in *Eastern Maico*, finding that "the congruence of interests between attorney and client here is so great that counsel's status as a non-party is questionable. We see no reason to permit indirectly through the attorney's appeal what the client

could not achieve directly on its own." *Kordich*, 715 F.2d at 1393. Thus, the *Kordich* Court disallowed immediate appeal of the sanction orders and held that the orders were reviewable on appeal after the entry of final judgment. *Kordich*, 715 F.2d at 1393.

The *Thomas E. Hoar, Inc.*, *Ortho*, and *Kordich* cases involved circumstances where the attorney and the party were held jointly and severally liable for payment of the sanctions. In *Eastern Maico*, the Third Circuit addressed a situation where an attorney for a party and the party were sanctioned in separate orders. The attorney and the party were not held jointly and severally liable. *Eastern Maico*, 658 F.2d at 945-46. The Court nonetheless determined that the party could appeal the sanction order only after final judgment was entered. The Court rejected the assertion that even if the party could appeal after final judgment, the attorney was entitled to an immediate appeal as of right. *Eastern Maico*, 658 F.2d at 948. The Court stated that if the sanctions became appealable simply because they had been imposed against the attorney advising the motion rather than the party on whose behalf it was made, the result would be as incongruous as the outcome which would follow immediate appealability by a party. *Eastern Maico*, 658 F.2d at 949.

In *Sanders Associates, Inc. v. Summagraphics Corp.*, 2 F.3d 394 (Fed. Cir. 1993), the Federal Circuit denied jurisdiction of the immediate appeal of a sanction award. The Court engaged in a lengthy discussion of the obvious conflict between the circuits as to the immediate

appealability of attorney sanctions, noting that there is even a dispute among the circuits when the client is also sanctioned. The Court denied jurisdiction not only under the third prong of the Cohen test, but also under the Second prong -- noting that on the record before it, it could not conclude that the sanctioned conduct was completely separate from the underlying action.

The above-described decisions reveal inconsistent treatment, irreconcilable results, and faulty analysis. There is currently an embarrassing dispute among the circuits as to the very emotional and very problematic issue of interlocutory attorney sanction appeals, and this dispute can only likely be resolved by this Court. In the present litigation, the Second Circuit, in fact, recognized that the decision to grant immediate appealability might be a mistake. (A13) ("Were we writing on a clean slate, we would be tempted to confine *Cheng* to its unusual facts and characterize the sanctions order here as nonappealable under the *Cohen* doctrine.") Nonetheless, the Court held that it was bound by its precedent.

Not only is there a conflict among the circuits as to this issue, but the analysis applied by the respective circuits is entirely inconsistent. An attorney either does or does not have a right to an appeal of a sanction award after the rendering of a final disposition of a case, and the dispute as to this issue should be resolved and likely can be resolved only by this Court.

E. There Should Be No Immediate Appeals Of Attorney Sanction Awards

Petitioner respectfully submits that immediate appeals of interlocutory attorney sanctions create a very real and very prejudicial threat of substantial delay to the underlying action caused not only by the appeal itself, but by the repeating of the sanctioned conduct in the district court in the event of a reversal of the sanction award by the appellate court. The Second Circuit, for instance, has been extremely forgiving under 28 U.S.C. §1927, and Attorneys of the type who in bad faith vexatiously multiply district court proceedings and are nonetheless excused by appellate courts are likely to repeat or amplify their vexatious conduct once having been vindicated by the appellate court. It is no coincidence that the attorney sanctioned in this instance, Avrom R. Vann, Esq. has twice been sanctioned under 28 U.S.C. §1927 in separate reported decisions by different Judges in the Southern District of New York -- both of which were vacated by the Second Circuit for highly "technical" reasons. Here, the Second Circuit found that Mr. Vann was not given adequate notice of the imposition of sanctions under 28 U.S.C. §1927, holding for the first time that "particularized" notice is required before an attorney may be sanctioned under any statute or the Court's inherent power.

While Judge Feinberg noted in *Cheng* the existence of an "ethical quandary" facing a sanctioned attorney, in that the attorney's representation of his or her client's

interests might be compromised by a sanction award, this does not justify prejudicing the innocent adversary party by permitting an immediate appeal. The possibility that an attorney faces an ethical quandary as to his or her continued representation of his or her client after having been sanctioned should not be a consideration since the attorney's duty to represent his or her client cannot be compromised. If it is, the attorney is duty-bound to withdraw from representation.

When appellate jurisdiction is exercised over an interlocutory decision, the underlying action may be affected to a great extent. This is especially so in attorney sanction cases. For example, in *Cheng v. GAF Corp.*, 713 F.2d 886 (2d Cir. 1983), *later app on other grounds*, 747 F.2d 97, *vacated*, 87 L.Ed.2d 626, 105 S.Ct. 3493, the Second Circuit reversed an order awarding attorneys fees and expenses for the cost of defending against counsel's allegedly unreasonable and vexatious attempts to disqualify opposing counsel. The Second Circuit noted that the attorney was penalized for filing a motion that he believed to be in his client's interest, a belief strengthened by the court of appeals' decision in the case reversing the refusal of the district court to disqualify the law firm of the opposing counsel.

Briefly, in *Cheng*, the appellant filed an employment discrimination suit in 1977 against the appellee corporation. In 1979, the attorney for the appellant moved to disqualify a law firm from further representing the corporation in the case. The district

court denied the motion, but in August 1980 the Second Circuit reversed that interlocutory decision. In February, 1981, this Court granted certiorari, vacated the court of appeals' decision and remanded, citing the intervening case of *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368 (1981), which held that denials of motions to disqualify may not be reviewed until after trial except in special circumstances warranting a writ of mandamus. Before the remand reached the Second Circuit, the appellant moved in that court for consideration of his appeal *nunc pro tunc* as a request for mandamus, but such motion was summarily denied. In May, 1981, the appellant again moved for a disqualification order, and when the district court denied the motion, he sought a writ of mandamus from this Court, which was subsequently denied. The district court then granted an award of attorneys fees and costs incurred in defending against the most recent efforts to disqualify the law firm pursuant to 28 U.S.C. §1927. The district court stated that it was not prepared to fault him for again seeking to disqualify, but nevertheless found that the subsequent mandamus and the subsequent application for a writ of certiorari to the Supreme Court from its denial were frivolous in the extreme and unreasonably and vexatiously multiplied the cost to the defendant with no genuine chance of success. Thus, the district judge assessed attorneys' fees, costs, and expenses not for a motion before that court, but for the petitions filed in the appellate courts.

In reversing the award of sanctions, the Second Circuit stated that it did not find surprising that the appellant should seek mandamus in light of this Court's suggestion in the *Firestone* case that mandamus may be appropriate under exceptional circumstances. Furthermore, the Second Circuit stated that its own prior decision on the merits (although vacated for lack of jurisdiction) was enough to justify the appellant's efforts since this Court in vacating the decision did not address the appellate court's treatment of the merits. The Second Circuit commented that a rule permitting a district court to sanction an attorney for appealing an adverse ruling might deter even a courageous lawyer from seeking the reversal of a district court decision.

As can be seen from *Cheng*, the improvident exercise of appellate jurisdiction over various interlocutory orders can indelibly affect the progress of the underlying action. In *Cheng*, the Second Circuit initially reviewed and reversed the district court's denial of the appellant's motion to disqualify. On appeal from a sanction award, the Court once again reviewed the propriety of the motion to disqualify. Thus, in two separate appeals, the Court held that moving to disqualify was appropriate under the circumstances. Thus, the appellant sought yet another time to disqualify opposing counsel, and was successful -- years after his initial motion to disqualify was denied. Such a delay is, without question, prejudicial to a plaintiff's case and will permit a corporate defendant to lawfully deplete its assets, declare bankruptcy, and avoid

the effects of a judgment. The potential for abuse of the appellate process, the likelihood of substantial additional delay, and the repeat of the sanctioned conduct dictate against immediate appeals of interlocutory attorney sanctions.

When the question of a sanction is involved, the appellant will undeniably seek review of the propriety of his or her actions resulting in the sanction. In *Cheng* the appellant did not need to do so since the appellate court had already approved of his motion to disqualify. In addressing the attorney's conduct in its decision, the Court, however, substantially affected the course of proceedings below because the appellant, having been vindicated by the Court, sought yet again to disqualify opposing counsel.

By appealing a sanction award, an attorney seeks review of his or her conduct. Thus, the appellate court is explicitly called upon by to adjudge that conduct as either sanctionable or non-sanctionable. Should the court determine the conduct to have been non-sanctionable, the results could, and likely would, have an indelible and devastating effect on course of the action below. If the appellate court decides that the attorney's conduct was not improper, a competent counsel might be remiss if he or she did not seek to repeat such conduct in the district court, thereby causing additional delay.

On the other hand, should the appellate court consciously refrain from addressing the propriety of the attorney's conduct that gave rise to the sanction, so as to

avoid irreparably delaying or substantially affecting the conduct of the trial, the attorney could then reasonably argue that he or she was denied a fair appeal.

When this Court set forth the Cohen collateral order exception, it clearly intended for the second prong of the test not only to require only that the appealed order is "distinct" from the "merits" of the underlying dispute itself, but to require that the appeal be capable of decision without substantially affecting the underlying action. The "separateness" prong of the Cohen rule precludes appellate jurisdiction when the issues presented for review by the appellate court are not sufficiently separate from the underlying action. A review of the cases denying appellate jurisdiction will readily reveal the compelling nature of this argument.

F. Immediate Appellate Jurisdiction Does Not Exist Since a Sanctioned Attorney Can Seek Review of a Sanction Order After Completion of the District Court Case

Petitioner appreciates Judge Feinberg's recognition in *Cheng* that if a case is settled or his client prevails, a sanctioned attorney may be denied any possibility of appeal. It was for this reason that Judge Feinberg concluded that sanction awards meet the irreparable harm requirement of the third Cohen factor. However, Judge Feinberg was incorrect because even the realistic possibility of a settlement or of a sanctioned attorney's client prevailing does not preclude a sanctioned attorney from appealing a sanction award after final disposition.

This mechanism may be effected by intervention. For example, in the Fifth Circuit's decision in *Lipscomb v. Wise*, 643 F.2d 319 (5th Cir. 1981), an attorney was granted the right to intervene or appeal in a dispute over attorneys' fees:

> We must first consider whether plaintiffs' attorneys have standing to appeal. Ordinarily, an appeal from a judgment may be taken only by a party-litigant adversely affected by it. In theory, attorneys for a litigant are not personally affected by a judgment. Even in the limited class of cases in which attorney's fees may be awarded, the award is made to the prevailing party, not to counsel. However, as a practical matter, the lawyer is frequently the only person adversely affected when attorneys' fees are denied ... When they are the real parties in interest, attorneys are entitled to a day in court (emphasis added).

Indeed, it has been long settled that "an attorney may himself appeal from a decision awarding or denying him fees as long as the original action to which the question is ancillary, properly evokes the jurisdiction of the federal courts." *Preston v. United States*, 284 F.2d 514 (9th Cir. 1960)(citing *Meddaugh v. Wilson*, 151 U.S. 333 (1894); *Singer v. General Motors Corp.*, 136 F.2d 905 (2d Cir. 1943).

Moreover, as noted by the Court in *Dietrich Corp. v. King Resources Co.*, 596 F.2d 422 (10th Cir. 1979),

"under all of the circumstances [the attorney] is an aggrieved party and his property interest can be protected only by recognizing this as one of those extraordinary cases where a nonparty may be allowed to appeal." (citing *Commercial Security Bank v. Walker Bank & Trust Co.*, 456 F.2d 1352, 1354 (10th Cir. 1972) and *West v. Radio-Kieth-Orpheum Corp.*, 70 F.2d 621, 623-24 (2d Cir. 1934)).

Thus, an attorney has a sufficient interest in the grant or denial of a statutory award of attorneys' fees so as to permit the attorney to intervene or appeal in his own right. The appellate courts are clearly vested with jurisdiction to hear such an appeal. Without a doubt, an attorney most certainly has a sufficient interest in the statutory imposition of attorneys' fees as a sanction to permit the same rights. Thus, as recognized by various circuit courts which have denied jurisdiction for an immediate appeal of a monetary sanction as failing to meet the third prong of the Cohen test, it cannot be seen why an attorney would not have the right to appeal such a sanction after resolution of the underlying dispute.

For the foregoing reasons, petitioner respectfully requests that this petition be grated and that a writ of certiorari be issued.

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(Attorney for Petitioner TED LAPIDUS, S.A.)

TED LAPIDUS, S.A., Plaintiff-Appellee, v. AVROM R. VANN, ESQ., Appellant, - and - 77 WORLD DESIGN, INC., DESIGNERS ONLY, INC., NAMES FOR DAMES, INC., STANLEY WARNER, ROCHELLE PAZER, JACK WELIKSON, VARIOUS JOHN DOES, JANE DOES and XYZ COMPANIES (Unidentified), Defendants.

Docket No. 96-9043

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

112 F.3d 91; 1997 U.S. App. LEXIS 8609; 42 U.S.P.Q.2D (BNA) 1614

March 20, 1997, Argued
April 25, 1997, Decided

SUBSEQUENT HISTORY: [*1] As Corrected.

PRIOR HISTORY: Appeal from order of United States District Court for the Southern District of New York, Cedarbaum, J., awarding sanctions against counsel for defendants pursuant to 28 U.S.C. § 1927.

DISPOSITION: Vacated and remanded.

COUNSEL: AVROM R. VANN, New York, NY (Vann & Slavin, P.C., of Counsel), for Appellant.

BRUCE L. ADAMS, New York, NY (Adams & Wilks, of Counsel), for Plaintiff-Appellee.

JUDGES: Before: FEINBERG and PARKER, Circuit Judges, and SHADUR, * District Judge.

* Honorable Milton I. Shadur, United States District Judge for the Northern District of Illinois, sitting by designation.

FEINBERG, Circuit Judge:

Avrom R. Vann, Esq., attorney for defendants 77 World Design, Inc. (77 World) and its president and chief executive officer Stanley Warner, appeals from an order entered in the United States District Court for the Southern District of New York, Miriam Goldman Cedarbaum, J., awarding sanctions against Vann pursuant to 28 U.S.C. § 1927. The controversy started as a trademark infringement suit brought by plaintiff Ted Lapidus, S.A. (Lapidus) against defendants 77 World, Warner and others, in the course of which Lapidus caused a court-ordered seizure of allegedly infringing goods at the business premises of 77 World. This brought about counterclaims by defendants and an attempt by them to bring a third-party complaint against agents of Lapidus based upon alleged improprieties in executing the seizure.

Lapidus then filed a motion seeking sanctions against Vann under Fed.R.Civ.P. 11, alleging that the third-party complaint was procedurally improper, that defendants needed leave of court to assert their claims, and that they refused to voluntarily dismiss the third-party complaint despite clear warning from the district court that it would not grant such leave. The district court noted that Lapidus had "failed to comply with the procedural requirements of Rule 11." The judge nevertheless awarded sanctions against Vann sua sponte under 28 U.S.C. § 1927 in the amount of $ 10,000. Because we believe that Vann did not receive sufficient notice that § 1927 would be invoked against him, we vacate the award and remand.

I. Facts and Proceedings Below

Lapidus manufactures high fashion wearing apparel and related accessories, which it markets under the registered trademark TED LAPIDUS. The clothing is also produced by other companies under license. Lapidus commenced the underlying trademark infringement action in October 1994. The complaint alleged that 77 World and certain other clothing manufacturers, former licensees of Lapidus, and their officers were engaged in counterfeiting and marketing bogus TED LAPIDUS clothing. Concerned that the defendants would transfer or destroy the allegedly counterfeit goods, Lapidus obtained an ex parte court order authorizing the United States Marshal to search defendants' business premises and seize any infringing

items bearing the Lapidus trademark. The order provided that the Marshal was to be assisted by one or more of plaintiff's attorneys or agents. It further provided that "if it is impractical to obtain assistance from [the] U.S. Marshal and deputies and other law enforcement agents, then employees and agents of Associated Investigative Services, Inc. [Associated], a licensed and bonded private investigative service experienced in the civil seizing of counterfeit products," would be permitted to search for and seize the infringing items. The order further provided that "the U.S. Marshal or his or her deputy and/or other law enforcement agents shall at his or her discretion, arrest any defendant who attempts to obstruct or prevent service and seizure."

Lapidus caused its agents to search the premises of 77 World the same day the ex parte order was signed. According to defendant Warner, the search was conducted by Associated, its employee David Woods, Lapidus's attorney Bruce Adams, and other agents of Adams's law firm, Adams & Wilks, all under the direction of Adams. Warner claims that the searchers did not identify themselves or present him with a copy of the search order. When Warner took steps to protect the property of 77 World, one of the searchers called in the New York City Police. The police handcuffed Warner based on a complaint by one of the Lapidus agents present, but released him a half-hour later. Lapidus claims to have seized during the search "many thousands" of falsely labeled garments and "documentation revealing the

unauthorized sale of millions of dollars" of such garments.

In their answer to plaintiff's complaint, Warner and 77 World asserted a counterclaim against Lapidus for violation of the seizure order and Warner alleged an additional counterclaim for false arrest. In June 1995, some seven months after serving their answer, Warner and 77 World served and filed a document entitled "Third Party Complaint," naming Adams & Wilks, Adams, Associated, and Woods as third-party defendants. The third-party complaint asserted claims for breach of the seizure order and for false arrest of Warner. The complaint was signed by Vann.

In July 1995, Adams advised Vann by letter that he believed the claims raised in the third-party complaint could not be maintained, that Vann could have discovered this upon reasonable inquiry, and that he had therefore violated Fed.R.Civ.P. 11. Adams threatened to seek sanctions against Vann and defendants for filing a frivolous claim unless the third-party complaint and "related counterclaims" were withdrawn by the following day. Later that month, in an unrecorded pre-motion conference, the district court apparently advised Vann that, assuming it had jurisdiction over claims alleged in the third-party complaint, in the exercise of its discretion it would not grant leave to add those claims to the underlying action. Vann denies that the court made any clear ruling.

In August 1995, Adams again informed Vann that he would move for sanctions if Vann did not promptly

withdraw the third-party complaint and counterclaims. Adams also sent Vann a proposed motion to dismiss the third-party complaint and draft memorandum of law, which were not filed at that time with the district court. Adams sent two additional letters during the month of August, advising Vann of his intention to move for Rule 11 sanctions and for dismissal of the third party complaint. Vann continued to refuse to withdraw the third-party complaint based on his belief that the claims were properly made.

In September 1995, Warner moved to disqualify Adams from representing Lapidus on the ground that Adams was a defendant in the third-party action and would be a necessary witness with respect to the counterclaims and the third-party claims. n1 The district judge denied the motion, pointing out that bringing a motion to disqualify counsel on a ground that Vann had himself created demonstrated bad faith.

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n1 Vann vigorously contends that the district court itself, in an unrecorded pre-motion conference in July, raised the possibility that Adams might have to be disqualified as a necessary witness on the counterclaims.

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The next day, Adams served and delivered to the district court Lapidus's motion to strike the third-party

complaint and for Rule 11 sanctions (the Rule 11 motion). Attached to it was a memorandum of law, which the district judge characterized as "similar but not identical to" the draft included with Lapidus's earlier letter threatening to move for sanctions. That memorandum asserted that Vann's motion was improper under Fed. R.Civ.P. 14, and that additional parties could only be joined pursuant to Fed.R.Civ.P. 20, which requires leave of the court. Lapidus sought sanctions, representing legal fees incurred in opposing defendants' third-party complaint for Vann's failure to follow proper procedure and his refusal to voluntarily dismiss the third party complaint. Neither the papers filed in support of Lapidus's motion nor the letters sent earlier by Adams threatening to seek such sanctions referred to any basis for sanctions other than Rule 11.

After receiving Lapidus's Rule 11 motion, Vann advised the court that defendants were "willing to consent to the entry of an Order discontinuing without prejudice and without costs or disbursements to any party as against the other, the third party complaint." Vann submitted a proposed order. Adams responded that Lapidus did not consent to the proposed order to the extent that it did not provide for an award to Lapidus of attorneys' fees.

In October 1995, supported by an affidavit by Vann, Warner cross-moved for leave nunc pro tunc to serve and file the third-party complaint and for sanctions against Adams and Lapidus under Rule 11. Defendants also responded, in a single paragraph of Vann's affidavit, to

Lapidus's Rule 11 motion, arguing that it was procedurally improper under the Rule's "safe harbor" provision. See Fed.R.Civ.P. 11(c)(1)(A).

The district court held a hearing later that month (the October 1995 hearing) on Lapidus's motion to dismiss the third-party complaint and for sanctions and on Warner's cross-motion. During the hearing, the judge again stated that she would not exercise jurisdiction over the claims in the third party complaint. Vann agreed to withdraw the complaint, and submitted a notice of voluntary dismissal the following week. The district judge reserved decision on Lapidus's motion for Rule 11 sanctions. Although the motion mentioned only Rule 11 as a ground for sanctions, the judge indicated that she was considering another basis for sanctions. At one point she stated, "forget Rule 11. Multiplication of the litigation and duplication of papers is prohibited in the Judiciary Act. I am just looking for the provision. It really is just a limit to how much paper lawyers can generate, which does nothing but proliferate other papers." Toward the end of the hearing, the judge indicated that she might "impose sanctions under a different provision."

In an opinion dated August 6, 1996, the judge noted that Lapidus's motion for sanctions did not comply with Rule 11 in two respects: it was "not made separately from another motion" and "Lapidus presented [it] to the court less than twenty-one days after serving it," thereby violating the Rule's safe harbor provision. The judge nonetheless sanctioned Vann in the amount of $ 10,000, n2

under 28 U.S.C. § 1927, concluding that "in any event, the provisions of [that section] better capture the impropriety of Vann's actions." This appeal followed.

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n2 The money has apparently not yet been paid. Vann represented to this court at oral argument, without objection from Adams, that the parties have agreed not to act on the judgment until this appeal is decided.

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II. Discussion

A. Jurisdiction

In their original briefs to us, neither party focused on this court's jurisdiction over this appeal. We raised the issue sua sponte, and asked the parties to be prepared for questions on it at oral argument. At that time, we requested submission of letter briefs, which we have since received.

The federal courts generally abide by the "final judgment" rule, under which the courts of appeals ordinarily have jurisdiction only over appeals from "final decisions" of the district courts, see 28 U.S.C. § 1291, a term that the Supreme Court has interpreted to mean "a decision by the District Court that ends the litigation on

the merits and leaves nothing for the court to do but execute the judgment." *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 373, 66 L. Ed. 2d 571, 101 S. Ct. 669 (1981) (internal quotation marks omitted). The final judgment rule, among other things, "serves the important purpose of promoting efficient judicial administration," *id.* at 374, by avoiding piecemeal litigation and eliminating the delays caused by interlocutory appeals. See Richardson-Merrell, Inc. v. Koller, 472 U.S. 424, 430, 86 L. Ed. 2d 340, 105 S.Ct. 2757 (1985).

However, it has long been established that a small class of orders that do not terminate the underlying litigation are appealable as collateral orders despite the finality requirement of 28 U.S.C. § 1291. n3 *Cohen v. Beneficial Indust. Loan Corp.*, 337 U.S. 541, 546-47, 93 L. Ed. 1528, 69 S. Ct. 1221 (1949). To be immediately appealable, an order must meet three criteria: "The order must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468, 57 L. Ed. 2d 351, 98 S. Ct. 2454 (1978).

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n3 Certain interlocutory orders, specified in 28 U.S.C § 1292, are also immediately appealable. The section is not relevant here.

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With regard to the first of these criteria, the $ 10,000 assessment has been conclusively determined and reduced to a sum certain. *Cf. Cooper v. Salomon Bros., Inc.*, 1 F.3d 82, 84-85 (2d Cir. 1993). With regard to the other two criteria, we believe our prior decisions require us to hold that they are satisfied, as well.

In support of jurisdiction, Vann relies heavily on *Cheng v. GAF Corp.*, 713 F.2d 886 (2d Cir. 1983). In that complicated litigation, after the parties had made two trips to the Supreme Court, *see id.* at 888, the district court assessed plaintiff Cheng's lawyer $ 1,000 under § 1927 for his allegedly "unreasonable and vexatious" attempts to disqualify GAF's counsel. The sanctioned conduct was an unsuccessful petition to this court for a writ of mandamus ordering the district judge to disqualify GAF's counsel and a subsequent application for a writ of certiorari to the Supreme Court. The district judge assessed sanctions against Cheng's lawyer, "not for a motion before the district court, but for the petitions filed in the appellate courts." *Id.* On appeal to this court, the majority of the panel over a vigorous dissent determined that we had jurisdiction to review the sanction award and reversed it. n4

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n4 After the remand, Cheng again moved to disqualify GAF's counsel and was successful. GAF appealed to this

court and we affirmed. 747 F.2d 97 (2d Cir. 1984). Thereafter, the case went to the Supreme Court for still a third time. The Court vacated the judgment and remanded the case to this court with instructions to dismiss the appeal for want of jurisdiction. 472 U.S. 1023, 105 S. Ct. 3493, 87 L. Ed. 2d 626 (1985).

----------End Footnotes----------

Our decision in *Cheng* might easily have been limited to its "unusual facts." Id. at 890. The case is cited for the proposition that it is improper for a district court to impose sanctions for appeals taken to the circuit court. *Schoenberg v. Shapolsky Publishers, Inc.*, 971 F.2d 926, 935 (2d Cir. 1992); *In re Emergency Beacon Corp.*, 790 F.2d 285, 288 (2d Cir. 1986). In this light, *Cheng* might plausibly have been read as an action similar to mandamus because the district court had clearly exceeded its authority.

Cheng has, however, been relied on in a number of decisions in this circuit broadly authorizing a non-party attorney to bring an immediate appeal from an award of sanctions. *E.g. Satcorp Int'l Group v. China Nat'l Silk Import & Export Corp.*, 101 F.3d 3, 5 (2d Cir. 1996) (Rule 37 sanctions); *Thomas E. Hoar, Inc. v. Sara Lee Corp.*, 882 F.2d 682, 685-86 (2d Cir. 1989) (same); *Sanko S.S. Co. v. Galin*, 835 F.2d 51, 53 (2d Cir. 1987) (Rule 11 sanctions); *see also United States v. Johnson*, 801 F.2d 597, 599 (2d Cir. 1986) (civil contempt order against non-party

witness). We see no persuasive basis on which to distinguish the present case.

We recognize that some other circuits do not agree and have denied an immediate appeal in this situation principally because sanctioned counsel would have a right to appeal later and because the sanction order "may not be entirely separable from the underlying case." *See Sanders Assocs., Inc. v. Summagraphics Corp.*, 2 F.3d 394, 395-96 (Fed. Cir. 1993) (noting circuit split and collecting cases). The reasoning of those decisions that deny appealability is not without force, in view of the salutary policies that animate the final judgment rule. Application of the Cohen collateral order doctrine requires careful attention to the facts of each case. In this case, the flurry of arguments, charges and counter-charges, motions and cross-motions and other papers in the district court n5 has effectively diverted for far too long the attention of the parties and the district court from the merits of the underlying trademark litigation. Were we writing on a clean slate, we would be tempted to confine Cheng to its unusual facts and characterize the sanctions order here as nonappealable under the Cohen doctrine. However, we are constrained by our precedents, and we therefore conclude that we have jurisdiction to hear this appeal.

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n5 The pattern has been repeated to some extent in this court.

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B. Insufficiency of Notice

We turn now to the award of sanctions under § 1927. We review a district court's decision to impose sanctions for abuse of discretion. *MacDraw, Inc. v. CIT Group Equip. Fin., Inc.*, 73 F.3d 1253, 1257 (2d Cir. 1996). Vann raises a number of substantive objections to the award. We do not need to reach these arguments, because we agree with Vann that he was not afforded due process in the imposition of sanctions.

"Due process requires that courts provide notice and opportunity to be heard before imposing any kind of sanctions." *In re Ames Dept. Stores, Inc.*, 76 F.3d 66, 70 (2d Cir. 1996) (emphasis in original). The Third Circuit has interpreted the notice requirement to mean "specific" notice of the sanctioning authority being considered and the conduct alleged to be sanctionable. *See Zuk v. Eastern Pa. Psychiatric Inst. of the Med. College of Pa.*, 103 F.3d 294, 298 (3d Cir. 1996); *Jones v. Pittsburgh Nat'l Corp.*, 899 F.2d 1350, 1357 (3d Cir. 1990).

The purpose of particularized notice is to put counsel "on notice as to the particular factors that he must address if he is to avoid sanctions." *Jones*, 899 F.2d at 1357. If Rule 11 and § 1927 sanctions were identical in all respects, "particularized notice as to one sanction would arguably suffice to fully inform [counsel] as to the

pendency of the other sanction." *Fellheimer, Eichen & Braverman, P.C. v. Charter Techs.*, Inc., 57 F.3d 1215, 1225 (3d Cir. 1995) (FE&B). But those two sections are not identical. n6 We have noted that: significant differences exist between Rule 11 and § 1927. For instance, Rule 11 sanctions may be imposed on both counsel and client, while § 1927 applies only to counsel. A Rule 11 violation must be based on signed pleadings, motions, or other papers. Section 1927 violations do not hinge on the presence of a paper. Rule 11 may not be employed to sanction obnoxious conduct during the course of litigation; whereas § 1927 applies to the unreasonable and vexatious multiplication of court proceedings. Rule 11 requires only a showing of objective unreasonableness on the part of the attorney or client signing the papers, but § 1927 requires more: subjective bad faith by counsel. Finally, misconduct under Rule 11 must be judged as of the time the paper was signed, whereas § 1927 invites attention to a course of conduct, and imposes a continuing obligation on attorneys to avoid dilatory tactics. *United States v. Intern. Bhd. of Teamsters*, 948 F.2d 1338, 1345-46 (2d Cir. 1991) (emphasis added). We note other procedural differences as well: Section 1927 contains no counterparts to the safe harbor and separate motion requirements of Rule 11.

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n6 Rule 11 provides for an "appropriate sanction upon

the attorneys, law firms, or parties" responsible for presenting to the court a pleading, written motion or other paper that the person cannot certify upon reasonable inquiry to be warranted in law and fact and without improper purpose. Fed.R.Civ.P. 11(b), 11(c).

Section 1927 provides that an attorney who "so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct." 28 U.S.C. § 1927.

----------End Footnotes----------

These differences have previously led us to conclude that, in a situation where sanctions are imposed under multiple provisions, "separate consideration of the available sanctions machinery is not only warranted, but necessary for meaningful review." *Id.* at 1346; *see also MacDraw*, 73 F.3d at 1262. We believe that a sanctioned attorney must receive specific notice of the conduct alleged to be sanctionable and the standard by which that conduct will be assessed, and an opportunity to be heard on that matter. *Compare Schoenberg*, 971 F.2d at 934 (motion for Rule 11 sanctions not sufficient to put party on notice that order of contempt was being considered under Rule 37) with *Fonar Corp. v. Magnetic Resonance Plus, Inc.*, 105 F.3d 99, ___ (2d Cir. 1997), slip op. at ____ (attorney

knew of charge that he had participated in dilatory discovery tactics, and notice of possible Rule 37 sanctions was sufficient to notify him that order of contempt was being considered under same Rule).

On the record before us, we cannot say that Vann received the notice to which he was entitled. Vann was notified only that Rule 11 sanctions were being sought. He came to the October 1995 hearing prepared to argue that Lapidus's Rule 11 motion was procedurally defective. n7 The issue of bad faith was not explicitly raised during that hearing, and Vann therefore was not sufficiently put on notice that this was his opportunity to defend himself against that charge. The court did ask Vann to address whether it should impose sanctions "for causing all of this unnecessary paperwork." Understandably, since no other ground for sanctions had been invoked to that point, Vann's response referred only to Rule 11.

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n7 Vann argued convincingly at oral argument before this court that, had he known of the possibility of bad faith sanctions under § 1927, he would have retained counsel to defend him at the October 1995 hearing, as he had during one previous encounter with § 1927. That he chose not to do so reflects his belief that the procedural defects of Lapidus's Rule 11 motion provided a complete defense to the threat of sanctions.

----------End Footnotes----------

Moreover, the district court went beyond the conduct specified in Lapidus's Rule 11 motion -- Vann's refusal to withdraw the third-party complaint -- and sanctioned Vann based at least in part on his "attempt to use the improper third party claims as grounds to disqualify plaintiff's counsel." Although Vann perhaps should have foreseen the district court's displeasure with his actions, we think he was entitled to more specific notice and a more focused hearing before sanctions were imposed.

Lapidus argues that, since Vann has tangled before with § 1927 sanctions in an unrelated case, he was on notice here that sanctions could be imposed under that section. But "'the mere existence of . . . § 1927 does not constitute sufficient notice'" that sanctions might be imposed under that section. *Zuk*, 103 F.3d at 298 (quoting Jones, 899 F.2d at 1357). An attorney must be forewarned of the authority under which sanctions are being considered, and given a chance to defend himself against specific charges.

Lapidus also relies on FE&B, which affirmed a sanctions award and rejected a claim that the attorney had insufficient notice. In that case, the Third Circuit took pains to point out that its holding was "a narrow one," 57 F.3d at 1225, leaving undisturbed such Third Circuit cases as Jones, which we cite with approval above. In any event, we do not believe that FE&B is contrary to our holding here. Unlike Vann, counsel in FE&B had "advance notice that the sanctioning court was

contemplating the imposition of sanctions which hinged on a finding of bad faith." *Id.* at 1226 (emphasis in original).

For the foregoing reasons, we vacate the award of sanctions and remand the matter to the district court for further proceedings. The district judge is, of course, free to impose sanctions again in her discretion, after holding an appropriate hearing upon notice. The record makes clear that the district judge believed that defendants' claims arising out of execution of the search warrant should be heard separately from the trademark infringement claims. We certainly cannot say that such a determination would be an abuse of discretion. Indeed, we applaud her efforts to keep both parties focused on the underlying suit. n8 We note that Vann has withdrawn the offending third-party complaint at the district court's bidding. At oral argument before this court, he further agreed that if Lapidus were willing to forego sanctions, Vann would counsel his clients to withdraw the related counterclaims, reserving their right to prosecute that matter in a state court. Perhaps that will suffice to allow the trademark infringement action to proceed, unimpeded by the distraction of the search warrant claims. In any event, we leave it to the sound judgment of the district judge to resolve this acrimonious dispute as expeditiously as possible.

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n8 At one point in the October 1995 hearing, the judge asked, "is anybody interested in getting to the merits of

this case?"

----------End Footnotes----------

Vacated and remanded.

TED LAPIDUS, S.A., Plaintiff, - against - 77 WORLD DESIGN, INC., DESIGNERS ONLY, INC., NAMES FOR DAMES, INC., STANLEY WARNER, ROCHELLE PAZER, JACK WELIKSON, VARIOUS JOHN DOES, JANE DOES and XYZ COMPANIES (Unidentified), Defendants.

94 Civ. 7694 (MGC)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

1996 U.S. Dist. LEXIS 11189; 40 U.S.P.Q.2D (BNA) 1698

August 6, 1996, Decided

August 7, 1996, FILED

DISPOSITION: Sanctions awarded against Avrom R. Vann pursuant to 28 U.S.C. § 1927. Vann directed to pay to plaintiff $ 10,000.

COUNSEL: APPEARANCES:

ADAMS & WILKS, Attorneys for Plaintiff, New York, New York, By: Bruce L. Adams, Esq., Paul R. Hoffman, Esq.

VANN & SLAVIN, P.C., Attorneys for Defendants, New

York, New York, By: Avrom R. Vann, Esq.

CEDARBAUM, J.

The issue before the court is whether counsel for Stanley Warner and 77 World Design, Inc., Avrom R. Vann, should be sanctioned for his conduct in connection with the "Third Party Complaint" served in this action. For the reasons that follow, sanctions are imposed against Vann pursuant to 28 U.S.C. § 1927.

Background

Upon commencing this action for trademark infringement, Ted Lapidus, S.A. obtained a court order authorizing the United States Marshal or his deputies to seize from defendants' business premises any allegedly infringing items bearing Lapidus' trademark. The order provided that the Marshal was to be assisted by one or more of plaintiff's attorneys or agents. It provided further that if it is impractical to obtain assistance from [the] U.S. Marshal and deputies and other law enforcement agents, then employees and agents of Associated Investigative Services, Inc., a licensed and bonded private investigative service experienced in the civil seizing of counterfeit products," would be permitted to search for and seize the infringing items. (Order dated 10/24/94.)

According to Warner, a search of the premises of 77 World was conducted by Associated, its employee David

Woods, Lapidus' attorney Bruce Adams, and other agents of Adams' law firm Adams & Wilks. Warner claims that Adams & Wilks, Adams, Associated, and/or Woods caused the New York City Police to arrest him at the premises of 77 World during the search. In their Answer, Warner and 77 World allege a counterclaim against Lapidus for violation of the seizure order and Warner alleges an additional counterclaim of false arrest.

In June of 1995, seven months after serving their Answer, Warner and 77 World served and filed a document entitled "Third Party Complaint." The complaint named Adams & Wilks, Adams, Associated, and Woods as third party defendants. It alleged a claim of breach of the seizure order, and, on behalf of Warner only, a claim of false arrest. The complaint was signed by Vann.

By letter dated July 10, Adams advised Vann that he believed the Third Party Complaint violated Rule 11 and that he would seek sanctions if Vann did not withdraw the Third Party Complaint and "related counterclaims." At a conference held on July 21, I advised Vann that, assuming that I had jurisdiction over the claims alleged in the Third Party Complaint, in the exercise of my discretion, I would not grant leave to add those claims to this action. Vann did not withdraw the Third Party Complaint. On August 2, Adams wrote Vann another letter informing Vann that he would move for sanctions if Vann did not withdraw the Third Party Complaint and the counterclaims. Adams enclosed a copy of his motion to strike the Third Party

Complaint and for sanctions; he did not file that motion or present it to the court. (Def. Cross-Motion Ex. 6 (Letter from Adams to Vann dated 8/2/96 and enclosures.)) Adams sent additional letters dated August 4 and August 21 in which he again advised Vann that he would move to dismiss the Third Party Complaint and for sanctions. (Letters from Adams to Vann dated 8/4/95 and 8/21/95.)

The Third Party Complaint was not withdrawn. On September 11, by order to show cause, Warner moved to disqualify Adams from representing Lapidus on the ground that Adams was a third party defendant in the action and would be a necessary witness with respect to the third party claims and counterclaims. Affidavits in support of the order to show cause were signed by Warner and by Vann. I pointed out that bringing a motion to disqualify counsel on a ground that Vann had himself created suggested a lack of good faith on Vann's part, and I denied the application.

On the next day, September 12, Adams served and delivered to the court Lapidus' motion to strike the Third Party Complaint. In this motion, Lapidus sought dismissal of the Third Party Complaint and attorneys' fees under Rule 11. The memorandum of law in support of the motion was similar but not identical to the draft memorandum that Adams sent to Vann on August 2. In addition, in this motion Lapidus sought $ 6000 more in attorneys' fees than was requested in the August 2 draft.

The Third Party Complaint still was not withdrawn. By

letter dated September 15, Vann advised the court that defendants were "willing to consent to the entry of an Order discontinuing without prejudice and without costs or disbursements to any party as against the other, the Third Party Complaint." (Letter from Vann to Judge Cedarbaum dated 9/15/95 at 3.) Vann enclosed a proposed order. Adams responded that Lapidus did not consent to the proposed order to the extent that the order did not provide for an award of attorneys' fees. (Letter from Adams to Judge Cedarbaum dated 9/22/95.)

On October 6, Warner cross-moved for leave nunc pro tunc to serve and file the Third Party Complaint and for sanctions under Rule 11. Oral argument on Lapidus' motion to dismiss the Third Party Complaint and for sanctions and on Warner's cross-motion was held on October 13. During oral argument, I again stated that I would not exercise jurisdiction over the claims in the Third Party Complaint. (Tr. 9.) Vann agreed to withdraw the complaint, and, the following week, submitted a notice of voluntary dismissal. I reserved decision on Lapidus' motion for sanctions under Rule 11, and also advised counsel that I might impose sanctions under a different provision. (Id. 24.)

Discussion

Rule 11 prohibits attorneys and unrepresented parties from presenting papers to the Court for any improper purpose and from presenting papers that contain frivolous

claims, defenses, or other legal contentions. Sanctions may be imposed against attorneys, law firms, and parties that violate the rule or cause a violation of the rule. Fed. R. Civ. P. 11(c).

A party seeking sanctions under Rule 11 must follow two special procedural requirements. First, a motion for sanctions under Rule 11 must be made separately from other motions or requests and must describe the specific conduct alleged to violate the rule. Id. 11(c)(1)(A). Second, the motion must "not be filed with or presented to the court unless, within 21 days after service of the motion . . . the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected." Id.

Vann indisputably had more than ample notice of Lapidus' objections to the Third Party Complaint and its intention to move for sanctions. Lapidus, however, failed to comply with the procedural requirements of Rule 11. Lapidus' motion for sanctions was not made separately from another motion and Lapidus presented its motion to the court less than twenty-one days after serving it. I need not decide whether these technical violations preclude an award of sanctions under the rule, however, because I conclude that, in any event, the provisions of 28 U.S.C. § 1927 better capture the impropriety of Vann's actions. *See United States v. International Brotherhood of Teamsters*, 948 F.2d 1338, 1345-46 (2d Cir. 1991) (explaining differences between Rule 11 and § 1927).

Section 1927 provides:

Counsel's liability for excessive costs

Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

28 U.S.C. § 1927 (1994). The Second Circuit has held that "an award under § 1927 is proper when the attorney's actions are so completely without merit as to require the conclusion that they must have been undertaken for some improper purpose such as delay." *Oliveri v. Thompson*, 803 F.2d 1265, 1273 (2d Cir. 1986), *cert. denied*, 480 U.S. 918 (1987). An award of sanctions under § 1927 requires a finding of bad faith. *MacDraw Inc. v. CIT Group Equipment Fin. Inc.*, 73 F.3d 1253, 1261 (2d Cir. 1996); *Oliveri*, at 1273.

Vann unreasonably and vexatiously multiplied the proceedings in this action. Vann persistently refused to withdraw the Third Party Complaint, even after I advised him that he could not litigate the claims raised in that complaint in this action. Vann attempted to use the improper third party claims as grounds to disqualify plaintiff's counsel. These actions unreasonably multiplied the proceedings in this case, and are so completely without

merit that I must conclude that they were taken in bad faith. Accordingly, sanctions are imposed against Vann under § 1927.

Section 1927 authorizes an award of sanctions in the amount necessary to satisfy the excess costs, expenses, and attorneys' fees "reasonably incurred" because of the improper conduct. Lapidus seeks $ 14,157.34 in attorneys' fees. I find that $ 10,000 is the amount of attorneys' fees reasonably incurred as a result of Vann's sanctionable actions.

Conclusion

For the reasons stated above, sanctions are awarded against Avrom R. Vann pursuant to 28 U.S.C. § 1927. Vann is directed to pay to plaintiff $10,000.

SO ORDERED.

Dated: New York, New York

August 6, 1996

MIRIAM GOLDMAN CEDARBAUM

United States District Judge